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American Bakers Association

Serving the Baking Industry Since 1897

Robb MacKie, Vice President Government Relations rmackie@americanbakers.org

July 6, 2001

General Services Administration
FAR Secretariat (MVP)
1800 F Street, NW, Room 4035
Washington, D.C. 20405

Attn: Ms. Laurie Duarte

Re: Revision of Federal Acquisition Regulations – Interim Rule
48 CFR Parts 9, 14, 15, 31 and 52 (FAR Case 1999-010)(stay);
Revision of Federal Acquisition Regulations – Revocation
48 CFR Parts 9, 14, 15, 31 and 52 (FAR Case 2001-014)

Dear Sir or Madam:

The American Bakers Association appreciates this opportunity to respond to the two rulemaking notices published by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration in the Federal Register on April 3, 2001, 66 Fed Reg. 17754, 17758. These initiatives relate to the modification of the Federal Acquisition Regulation ("FAR") by the FAR Council and the Office of Federal Procurement Policy ("OFPP") made through a regulation promulgated on December 20, 2000, 65 Fed. Reg. 80255, dealing with "Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Processes "

By way of background, the American Bakers Association ("ABA") is the trade association that represents the nation's wholesale baking industry. Its membership consists of more than 300 wholesale bakery and allied services firms. These firms comprise companies of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies produce approximately 80 percent of the nation's baked goods. The members of the ABA collectively employ tens of thousands of employees nationwide in their production, sales and distribution operations. The ABA, therefore, serves as the principal voice of the American wholesale bakery industry.

ABA-member companies operate highly productive organizations with technological and strategic efficiencies that are unparalleled As our members well recognize, however, it is in such

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organizations' economic interests, as well as the interests of their employees, customers, vendors and the public, that their working environments reflect values of safety, fairness and equality. Towards these ends, ABA-member companies typically devote substantial pro-active efforts to ensure legal and regulatory compliance in a host of critical areas. Among these are many continuous activities designed to avoid any intentional or unintentional violations of federal labor and employment laws. While this is the lawful, appropriate and ethical path of action, it also is clearly in the economic interests of each employer to eliminate compliance or legal problems which do arise on occasion, while extending great efforts to minimize and avoid difficulties in the future.

Despite their individual efforts and the clear motivations applicable to all employers in our industry, the punitive aspects of the stayed rules threaten to improperly apply new procurement rules without regard to traditional legal standards. ABA and its members believe that such rules would have an adverse effect on their abilities to contract with Federal agencies - a challenging process even with the significant strides made by the FAR Council. The stayed rules would, of course, subject their companies (and the employees whose jobs may be at risk) to otherwise unprovoked business challenges due to their potential mischaracterization under the proposed regulations.

Overview – ABA and its members recognize the importance of federal agencies ensuring that government contractors conduct their business in a manner which adheres to the highest possible standards of business ethics. However, although we fully recognize and support the concept of the U S. Government selecting the most responsible contractors, we oppose the recent FAR amendments and request their repeal. These amendments do *not* achieve the end they supposedly serve. They are vague, subjective, and imprecise in application. They subject innocent employers to unwarranted loss of contracts. They inappropriately reduce competition for government contracts (and, thus, unnecessarily cost the government – and taxpayers – more money). Last – but by no means least – they are subject to misuse, manipulation, and abuse by third parties, including labor unions, public interest groups, and business competitors.

For these and other reasons, discussed in more detail below, ABA members – as contractors that will be directly affected by the amendments – strenuously object to the recent revisions of FAR Parts 9, 14, 15, 31 and 52, and respectfully request that they should be promptly rescinded.

Length of Current Extension of "Stay"

The FAR Council recently stayed for compliance with the requirements of the recent FAR amendments, and subsequently extended the length of the stay. The *lack of time* contractors were given to ensure compliance with these onerous rules – e.g., by instituting necessary recordkeeping and compliance programs – was especially problematic given the potential False Statements Act liability (for signing false certifications) and Defective Pricing liability (for failing to account properly for newly-unallowable costs). More broadly, however, *no amount of time* would have been sufficient to comply with the Rule because of its excessive, burdensome requirements. Since we believe that the rules themselves are misguided and inappropriate, further extended stays should be granted until such time as the rules are officially rescinded.

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The OFPP and the FAR Council Have Exceeded Their Administrative Authority in Adopting the FAR Amendments

In promulgating the rules at issue, the OFPP and the FAR Council far exceeded their rulemaking authority. In general terms, the amendments alter the delicate balance of our employment and labor laws, including the legislated balance of available sanctions and remedies, and collective bargaining process. By creating new, substantial, and – in many respects – unprecedented adverse consequences for potential violations of employment and labor laws, the rules would add penalties beyond those already provided for in the underlying statutes. The amendments also would conflict directly with the terms of the underlying employment and labor statutes, and therefore, are preempted.

Congress has authorized the disqualification of contractors by the federal agencies in certain instances. For example, the DoL has this authority with respect to violations of certain labor laws relating to government contracts, such as the Service Contract Act and the Davis-Bacon Act. The Environmental Protection Agency has similar authority with respect to certain violations of environmental laws. For the remaining labor and environmental laws, and the other laws identified by the rule, Congress has established specific, carefully balanced remedies for violations, and has chosen *not* to include disqualification for government contractors among those remedies Congress has *not* delegated broad powers to federal agencies to disrupt this balance by adding additional penalties by regulatory action. Such a debate remains in the jurisdiction of the Congress should it be deemed necessary.

Nonetheless, the FAR amendments *radically* revise the already complex matrix of federal employment and labor laws. These laws have been thoroughly considered – with hearings, floor debates, votes, amendments, reauthorizations, oversight hearings, and further amendments – by Congress for at least the last 65 years. Yet, the FAR amendments improperly impose major changes in the law, without benefit of the legislative process, and contrary to Congressional intent. It is not the Executive Branch's prerogative to amend that which Congress has so carefully established through a Constitutionally mandated bicameral process.

In fact, some statutes would appear to specifically bar the penalty imposed by the rules. For example, Title VII states that:

> No government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended by any agency or officer of the United States under any Equal Employment Opportunity law or order, if such employer has an affirmative action plan which has previously been accepted by the government for the same facility within the past twelve months without first according such employer full hearing and adjudication." 42 U.S.C. § 2000e-17. *(Emphasis added.)*

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The OFPP's amendments – which allow a contracting officer to deny, withhold, terminate, or suspend an employer's contract *without* a hearing for EEO violations – clearly violate Title VII.

The FAR Council's New Rules Are Arbitrary, Highly Subjective and Inappropriate

Unfortunately, the FAR Council's final changes to the regulations previously proposed did *not* improve the regulation in any meaningful way. Rather, its modifications to the proposed rules were largely cosmetic. In fact, in some respects, they made the new rule even *more* objectionable in several ways than was the proposal. For example, while the FAR Council removed objectionable language from the original proposal that "alleged violations" could be the basis for adverse contract determinations, this change was largely meaningless since the revised final rule still permits "complaints" issued by any federal agency, board, or commission to serve as the basis for denial of federal contracts. As a practical matter, such initial "complaints" – particularly for large contractors – can be relatively routine. Moreover, such complaints *are* "alleged violations." Indeed, such complaints typically are far from a final adjudication on the merits, and give contracting officers discretion to deny federal contracts at a very preliminary and unresolved stage of the legal proceedings That type of discretion is subject to misuse and abuse – intentionally or unintentionally – particularly in the hands of officials who may lack the expertise to make such determinations.

Moreover, the final rule lacks guidance as to the severity, number, intent, or status of a contractor's appeal of an agency's complaint, and the government contracting officer simply may deny eligibility based on *any* violation or complaint without meaningful distinction. Thus, a contractor's eligibility could be based on an untrained government contracting officer's misinterpretation of a technical provision of an employment law. Indeed, minor violations – such as recordkeeping, paperwork, and administrative technical errors – could be the basis for denial of federal contracts, which would be unfair, unnecessary and inappropriate.

Also troublesome is language stating that contracting officers "should" give greatest weight to decisions within the *past* three years. While this was explained to be an attempt to focus contracting decisions on a relatively recent time period, contracting officers would still be allowed to "consider all relevant credible information" without any time limitation. Thus, contracting officers have been given substantial discretion to look well beyond a contractor's three-year track record. For example, a contractor may have settled a claim for "nuisance value" four years ago, which technically could be construed as a violation, and still be subject to contract denial.

Inexplicable was the removal of language from the initial proposal that violations must be "substantial" to trigger denial of contract eligibility. Based on this change in standard, *any* violation or pending complaint – no matter how trivial or how dated – can serve as the basis for a contract denial. By allowing contract denial based on "all relevant credible information," the FAR Council's final language still allows denial of contractor eligibility based on information supplied by unions, anti-business activists, disgruntled former employees, business competitors, and other third parties. The contracting process should *never* be open to such outside manipulation, and these

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changes swing the door wide open to such misuse and abuse For these reasons, ABA submits that the changes incorporated into the final rule provided little relief, failed to effectively address contractors' concerns, and – in some significant ways – made the final rule even worse.

The Connection Between a Contractor's Employment and Labor Law Record and Its Ability to Fulfill Contract Requirements Has Not Been Established

Under the FAR rule, employers with less-than-perfect employment and labor law compliance records can be denied government contracts based on an assumption that a company dealing with employment and labor disputes – regardless of the merits *or* its good faith – will be incapable of fulfilling its responsibilities under a government contract. However, employers in such situations already meet their contractual obligations – in both the public and the private sectors – every day. Contract performance either is *not* an issue, or at most is a distraction unrelated to the reality that every significant company in the United States confronts employment claims from time-to-time. They still typically conduct business and fulfill contractual obligations while such complaints are pending or after their adjudication. For the overwhelming majority of employers, including ABA members, there is *at most* a *de minimus* correlation between its employment and labor reputation/record, and their ability to fulfill the terms and conditions of a government contract.

The FAR's general contracting rules provide, at Part 9.406-2(a)(5), that if a contracting officer is to consider a contractor's alleged legal violations as part of the award process, there must be a nexus between the alleged legal violations and the contractor's current ability to perform the contract in question. A company's failure to remain completely free of employment and labor law controversies simply does not correlate to an inability to meet contract requirements. Conversely, a company's ability to remain free of all allegations of employment and labor law charges does not ensure that organization's ability to perform to expectations on a government contract.

Prior to the recent regulations, the FAR rules had *already* specified that the federal government may only award contracts to companies that have a record of "integrity and business ethics." *See* FAR Part 9.104-1(d). Existing FAR standards did not preface the award of government contracts on the Herculean achievement of a blemish-free employment and labor law record, precisely because it is not a factor that forecasts, with any degree of accuracy, a contractor's ability to perform a government contract responsibly.

As a practical matter, taken to their logical conclusion, the FAR amendments could eliminate *every* significant employer in the country from contracting with the U.S. Government. One-third of the civil case backlog in the federal court system constitutes employment cases of various kinds. Each workday in the United States, a substantial number of new employment litigation cases are filed. How many employers with significantly sized workforces entirely escape the variety of employment-related claims they face in an ever-increasingly litigious society? Very few.

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If virtually *every* major employer has at least some employment and labor disputes – and they do – then virtually *every* major employer would be subject to possible contract debarment. In such instances, which entities actually would be debarred? Those companies for whom some third party with a vested interest – unions, public interest groups, competitors, merger targets, plaintiffs' attorneys, disgruntled former employees – has a gripe or a grudge... or an economic incentive. It is clear that a process so subject to manipulation and abuse should not have been implemented.

- **The Regulations Do Not Accurately Predict Contractor Responsibility**

Linking the award of government contracts to the faulty standard embodied in the regulations will yield inaccurate determinations of contracting fitness. Government contracts will no longer be awarded to the best, most qualified, and most cost-effective bidders. The FAR's existing standards already serve the purpose of eliminating irresponsible bidders far more effectively than would the new regulations.

The fact that a large employer inevitably will have a number of employment and labor law charges against it does not provide *any* insight into that company's capacity to perform a government contract. It does not even, as a practical matter, tell us if the company is a "good" employer. Many of the most forward-thinking and pro-active employers in the country face employment-related charges and/or lawsuits of various kinds, regardless of their good faith efforts.

Conversely, a less responsible employer – or an *irresponsible* employer – may avoid any negative record in the employment and labor area for a plethora of different reasons such as: a tight job market, unsophisticated employees, confidential settlement of claims, employee turnover, and/or a relatively pro-employer local judiciary and jury pool. Moreover, the high success rate of employers on Motions to Dismiss and Motions for Summary Judgment on employment claims further underscores the unreliability of allegations in this area being used as a barometer for whether an employer is "good" and "ethical." Thus, an examination of an employer's employment and labor law charge history does *not* accurately or reliably indicate an ability to perform government contracts. Reliance on such factors as part of an effort to identify the best bidder substantially compromises the contracting process.

- **Contracting Officers do not have Sufficient Knowledge of the Underlying Employment and Labor Laws to Adequately Examine the Charges**

Even if one assumed that employment and labor practices really correlate with contracting capabilities – and even if one assumed further that mere *charges* of employment and labor law violations are equally effective indicators – most contracting officers simply do not possess sufficient knowledge of our nation's employment and labor laws to meaningfully evaluate and interpret that data. For the most part, contracting officers do not have the necessary training, experience, knowledge, and/or resources to conduct an examination of a government contractor's true employment and labor law reputation and record.

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It is precisely for this reason that Congress legislated that employer compliance with employment and labor laws be determined by the relevant enforcing agencies such as the Department of Labor ("DoL"), the Equal Employment Opportunity Commission ("EEOC"), the Occupational Safety and Health Administration ("OSHA"), the National Labor Relations Board ("NLRB") and – of most relevance – the Office of Federal Contract Compliance Programs ("OFCCP").

Most contracting officers, while clearly knowledgeable in government procurement policies and procedures, do not have sufficient specific knowledge of federal employment and labor laws to accurately interpret an employer's record in a conclusive way – particularly with so much riding on those determinations. There is no reason or justification to add employment and labor practices – which are already effectively "policed" and, when challenged, adjudicated by a wide range of other federal agencies with specific authority and substantial expertise – as an additional factor to contracting officers' analysis and decision-makings. It also would potential place them at the center of highly contentious employment disputes. Frankly, it would be patently unfair to contracting officers to place this additional unnecessary burden upon them.

The U.S. Government Itself Would be Barred from Contracting if it Was Covered by the FAR Amendments

The FAR amendments were based on the faulty assumption that an employer that violates (or is merely charged with violating) various laws is incapable and/or unwilling to abide by its requirements under contracts it enters into with the government. This assumption is illogical. If it were the case that employment and labor practices had any correlation to contracting abilities, right-minded companies would completely refrain from contracting with the U.S. Government.

In Fiscal Year 1998, for example, 5,702 unfair labor practice charges, 28,147 employment discrimination charges, and 2,274 charges of OSHA violations were filed against *the federal government* by its own employees If a correlation does exist between the presence of such charges and an employer's ability to be trusted in a contracting relationship, then this would lead to the conclusion that the U.S. Government itself is not fit to enter into contracts. This – clearly – is not the case. OFPP's new regulations paint alleged violators of other laws – such as those addressing tax and consumer protection – with similarly broad brushstrokes. However, many thousands of companies and individuals in this country have successfully challenged the Internal Revenue Service. Being audited does not equate with being fraudulent – far from it. Similarly, being charged with discrimination does not equate to a company being sexist or racist; or being targeted by a union does not equate to being anti-employee – again, far from it. Clearly, the amendment's standard has no correlation with contracting integrity.

The FAR Amendments Allow Third Parties, with Agendas of their Own, to Influence and Skew the Contract Procurement Process

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The new FAR amendments provide that contracting officers have the discretion to consider an employer's *pending* employment and labor law charges as a factor in determining the best bidder. While an employer can do much to prevent actual employment and labor law violations, it can do absolutely nothing to prevent groundless claims from being brought against it. The new rules create an opportunity for any number of individuals and groups to exert economic pressure on an employer by threatening to file various employment and labor charges, thereby damaging an employer's ability to obtain government contracts. This further compromises and distorts the contracting officer's analysis, and likely will produce inappropriate and unjustified contract awards and determinations.

As a practical matter, the FAR amendments are likely to open the door wide to such abuses. It is extremely likely that third parties will misuse the process – or use it selectively – to sabotage a government contractor's bidding opportunities by filing marginal charges. The new regulations will be misused to unfairly target responsible contractors and subcontractors with loss of federal contracts by a wide range of third parties with agendas unrelated to the OFPP's mission and priorities. Unions in particular will use the threat of blacklisting in corporate campaigns, organizing drives, litigation, settlement negotiations, and collective bargaining. To some extent, through "corporate campaigns" and other strategies, they already do. If contracting officers are instructed to consider *pending* charges of employment and labor law violations, the analysis of a contractor's business capacity will be skewed, as third parties will be handed (and are likely to utilize) a new weapon with which they may exert powerful economic pressure against employers over whom they wish to gain advantage.

The Recent FAR Amendments Deprive Contractors of Due Process Rights

Federal contracting officers *already* exercise the authority to place government contractors on debarment lists, foreclosing the possibility of the contractor obtaining any government contracts for a specified period of time. However, the new amendments would permit contractors to be blacklisted without public notice, without a presumption of innocence until proven guilty, without a hearing on the merits, and without an opportunity to appeal. Such due process violations are fundamentally unfair, contrary to the widely embraced and admired tenets of our legal system, and legally unsustainable.

The recent FAR amendments provide no mechanism by which a government contractor would have the right to defend itself against the allegation that it has a poor employment and labor law record. In fact, the rule does not even provide that a contractor must be notified when its employment and labor law record is being scrutinized – but only *after* a debarment decision has been made. Without such protections, allegations could be filed against an employer, and it could be barred from contracts, without its knowledge, input, and/or ability to defend itself against even the most scurrilous allegations. This would constitute a clear violation of the contractor's due process rights.

By virtue of the rules' assumption that multiple charge indicates poor employment and labor policies and practices, they set up a process whereby the employer that is the subject of the

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charges is presumed guilty of the charges unless proven innocent. Such a presumption violates the due process rights of the contractor. Indeed, it violates a basic tenet of American jurisprudence. Not only will the contractor be presumed guilty until proven innocent; it is unclear, under the amendments, whether a contractor *ever* will be given an opportunity to prove its innocence.

Also unclear are the questions of "if" or "how" an employer might appeal a blacklisting determination under the rule Given its guilty-until-proven-innocent framework, and the lack of any meaningful opportunity for the contractor to defend itself against a blacklisting determination at the initial stage, due process considerations require that, at the very least, some appeal process be re-introduced. Without them, a contractor might be accused of having poor employment and labor practices without timely or adequate notice of the accusation, presumed guilty of the accusation by the contracting officer and denied the opportunity to defend itself against the accusation. As a result blacklisted by the contracting officer as a result; and (5) subsequently denied the opportunity to appeal the determination

The FAR rules promulgated by the Clinton Administration shortly before leaving office deny a government contractor its due process rights at every stage of the contracting officer's deliberations. On this basis alone, the FAR amendments should be rescinded.

The FAR Amendments Undermine Existing Employment and Labor Laws

The Federal employment and labor statutes were devised as stand-alone laws with a well-crafted and time-tested hierarchy of remedial measures – a "delicate balance" is the phrase applied by courts to some of these measures – to effectively and appropriately address legal infractions by employers and employees alike. They are issue-specific, they place enforcement and adjudicative powers in the most appropriate hands, and – most importantly – they work, and work well. The addition of a second layer of penalties and enforcement, imposed by the government contract procurement process and potentially affecting billions of contract dollars and hundreds of thousands of jobs, would disrupt the careful and appropriate balance deliberately created by Congress and fine-tuned by the courts – *and* by federal employment and labor law agencies.

The FAR amendments allow the imposition of penalties on employers that were not authorized at any time by Congress in a very wide range of underlying employment and labor statutes. For example, the NLRA provides a comprehensive set of remedial measures for employers and employees who engage in unfair labor practices. Both sides are able to seek injunctions, certification, decertification, and orders to compel bargaining in good faith. Congress gave the NLRB exclusive jurisdiction over the NLRA, the enforcement and interpretation of its rules, the adjudication of disputes, and all sanctions on, and remedies for, employers and employees. If debarment is an appropriate penalty for noncompliance, then it should be up to Congress and the NLRB, and not another agency – with much less expertise *and* no specific Congressional authorizing power – to make and enforce such determinations.

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Similarly, OSHA – by specific legislative mandate – has a comprehensive set of penalties and remedial measures for infractions of its rules and regulations. OSHA has broad authority to interpret these rules and regulations, and to impose the appropriate sanctions and penalties for noncompliance. Again, if debarment is an appropriate remedy for significant infractions of OSHA's rules and regulations, it is the prerogative of Congress to adopt such penalties. Similarly, employment statutes such as Title VII, the ADEA, and the ADA all contain a series of remedies for a party aggrieved by a violation of the particular statute. Under these laws, an infraction is remedied by ordering the "guilty" party to compensate aggrieved individuals for losses related to the violation. A comprehensive – and dynamic – body of case law and administrative regulations specify an employer's and an employee's rights, responsibilities and remedies under these statutes.

They constitute a *system* for the enforcement, adjudication, notice, appeal, and remedy of employment issues whereby *all* parties' interests are served and protected. Clearly, the federal contracting officers and agencies have no such system in place. These rules do not provide such safeguards, and these agencies are not the appropriate entities to determine whether and when debarment is an additional and appropriate remedy for violations of these and other employment statutes.

As noted earlier, the new regulations provide added incentive for third parties to file even more tactical, marginal, and/or frivolous claims against employers under employment and labor statutes. In addition, the amendments serve to *discourage* employers from resolving such disputes quickly, easily, and out of court. Both effects are highly counterproductive to our legal system and to positive employee relations, *and* are contrary to well-established public policy.

The new regulations also interfere with an employer's statutory rights under § 8(c) of the NLRA, which permits an employer to express a view, argument, or opinion in written, printed, graphic, or visual form as long as it does not contain a threat of reprisal or force, or a promise of benefit. In *Chamber of Commerce v. Reich*, 74 F. 3d 1332, the D.C. Circuit Court of Appeals held that a regulation may *not* interfere with these rights When a company opposes a union's attempt to organize its work force, as is any company's right under the NLRA, it must be able to speak out against the union and against the concept of unionization in general. Over the years, a vast body of law has developed which draws very thin lines protecting what employers and unions may say, or even suggest, in the course of an organizing campaign. As a result, any organizing campaign has the potential to lead to numerous unfair labor practice ("ULP") charges filed by both the employer and the union. Sometimes the NLRB determines that the charges are substantiated and bars the communication by the employer or the union. In many other cases, however, the NLRB determines that the communication in question did *not* constitute a ULP, and thus was permissible under the NLRA.

Under the new FAR amendments, however, the mere *filing* of such ULP charges will adversely affect an employer's ability to obtain government contracts. Employers will have to choose between refraining from any speech that might be *alleged* to be a violation of the NLRA – *or* engaging in conventional and legal conduct in the course of a union-organizing effort, but

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risk losing their ability to obtain future government contracts. At a minimum, the new amendments have a chilling effect on employer free speech in opposing unionization or union actions when an employer could fear loss of federal contracts based simply on ULP allegations.

The FAR Amendments Will Produce Results that are not Cost-Effective

The new FAR amendments are likely to result in significantly increased costs to the federal government and to U.S. taxpayers by artificially and inappropriately manipulating who can qualify for, or keep, federal contracts, and decreasing the pool of potential bidders. In addition, the amendments may threaten the economic future of government contractors, and thus result in at least some layoffs and worker dislocations–a particularly undesirable result in this economy

Many excellent contractors might find themselves foreclosed from the opportunity to bid for government contracts by virtue a contracting officer's conclusion that they have an inadequate employment and labor law record. Alternatively, companies may *choose* to not participate in the contracting process, wishing to avoid having to justify their employment and labor records and practices, or to subject themselves to possible manipulation by outside parties. Other companies, who are *not* government contractors, may choose to "stay on the sidelines." None of these reactions are good for the U S. Government, the taxpayer, the employer community, or the American public at large

If the FAR amendments are not repealed, the U.S. Government will have fewer contracting options, and the best contractor – or contractors – may be excluded for irrelevant or improper reasons. If there are contracts for which – because of the FAR amendments – only *unionized* contractors bid (a likely AFL-CIO goal), the incremental increase in costs to the government will be substantial and undeniable.

CONCLUSION

ABA members are committed to conducting their business operations while observing the highest standards of ethics, integrity, and fairness in their employment practices. This commitment is evident in all aspects of ABA member business practices including, but not limited to, employment and labor practices and contract compliance. Our members are proud of their records in this regard. However, we *strongly* oppose the new FAR amendments. This new rule represents monumentally bad public policy, and neither makes employers better employers, *nor* government contractors better government contractors.

For the vast majority of employers, there is no nexus between their employment and labor reputation/record, and their ability to serve the government responsibly, effectively, and cost-effectively. Reliance on such irrelevant criteria will produce less favorable decisions and results in the contracting process by distracting from – and discounting – more relevant and appropriate

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criteria. Government contractors will be deprived of their due process rights – effectively being penalized for *allegations* of inappropriate conduct rather than *actual* inappropriate conduct, and thus the U.S. Government will likely base – in significant part – its contracting on selective perceptions rather than legal realities. The new FAR amendments, and their potential impact on employment and labor law policies, will undermine, detract from, and contradict the underlying basis, Congressional intent, and agency enforcement and adjudication of our federal employment and labor statutes. The unnecessary and inappropriate elimination of qualified bidders will decrease competition and ultimately adversely affect the budgeting process – giving federal agencies "less bang for their buck". Finally, the enactment and/or enforcement of the new FAR amendments will represent an inappropriate, excessive, and legally unsustainable exercise of OFPP's administrative authority.

ABA appreciates this opportunity to submit its views on the amendments to FAR Parts 9, 14, 15, 31, and 52, appreciates your consideration of its position, and pledges its on-going cooperation and participation in the rulemaking process, as appropriate, to assist in the Administration's decision-making on this critically important issue.

Respectfully submitted,

Robb MacKie
Vice President Government Relations